IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellants,

v.

EWALD B. NYQUIST, *etc., et al.*,
Appellees,

SENATOR WARREN M. ANDERSON, *etc.*,
Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*,
Appellees,

EWALD B. NYQUIST, *etc., et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*,
Appellees,

PRISCILLA L. CHERRY, *et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed November 21, 1972
Probable Jurisdiction Noted January 22, 1973

BRIEF ON BEHALF OF APPELLEE WARREN M. ANDERSON

JOHN F. HAGGERTY and
LOUIS P. CONTIGUGLIA
Attorneys for Appellee, Warren M. Anderson
Office and P.O. Address
Senate Chambers
Albany, New York 12224

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Preliminary Statement

Appellee, Senator Warren M. Anderson, is successor to Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate. Senator Brydges retired from the Senate on December 31, 1972. Appellee Anderson submits this brief on his appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 20, 1972, which declared that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State violate the Establishment Clause of the First Amendment to the Constitution of the United States and which permanently enjoins welfare payments under said sections: (1) to protect the health, safety and welfare of children attending nonpublic elementary and secondary schools located in poverty areas; and (2) to partially reimburse low-income parents for tuition paid by them to enroll their children in nonpublic elementary and secondary schools. Appellee, Senator Warren M. Anderson also moves herein to affirm so much of the judgment of the Court below as declared constitutional Sections 3, 4 and 5 of Chapter 414 which provide a modification of gross taxable income for middle-income parents for tuition paid to enroll their children in such nonpublic schools.

By agreement among counsel, the appellants in 72-694 will be deemed the appellants in this consolidated appeal.

Opinion Below

The opinion of the District Court for the Southern District of New York enjoining the welfare payments for poverty area schools and low-income parents under Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State and sustaining the constitutionality of the modification of gross taxable income, provided for under Sections 3, 4 and 5 of such chapter, and the dissenting opinion thereto, are reported in 350 F. Supp. 655 (S.D.N.Y. 1972).

Jurisdiction

The judgment of the District Court for the Southern District of New York was entered on October 20, 1972. On November 17, 1972 Senator Earl W. Brydges, predecessor in title to Appellee Warren M. Anderson, filed his Jurisdictional Statement in this Court. On January 22, 1973 this Court noted probable jurisdiction. The jurisdiction of this Court rests on 28 United States Code, Section 1253. The following most recent decisions sustain the jurisdiction of this Court to review judgment on direct appeal in this case: *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso,* 403 U. S. 602 (1971), and *Tilton* v. *Richardson,* 403 U. S. 672 (1971).

Questions Presented

Is the "Establishment Clause" of the First Amendment of the U. S. Constitution violated by those provisions of a 1972 New York State Legislative Program, which specifically provide a modification from gross taxable income for middle-income parents who pay tuition for their children enrolled in nonpublic schools; and which specifically assist poor parents in educating their children: (a) by partially paying State monies for insuring that the nonpublic school buildings in low income Title IV areas housing poor elementary and secondary school children comply with certain minimum State required health and safety maintenance standards; and (b) by partially reimbursing poor parents for secular tuition payments to continue their children in nonpublic schools, especially when there are insufficient public funds and buildings to educate these nonpublic school children in the public schools?

Statutes Involved

The statute involved is Chapter 414 of the 1972 Laws of New York State, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in

nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low-income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." (Appendix to this Brief)

Statement

Appellee, Senator Warren M. Anderson, is the Majority Leader and President Pro Tem of the New York State Senate. Appellee's predecessor Senator Earl W. Brydges, retired from the Senate on December 31, 1972 and thereafter Appellee Warren M. Anderson on January 3, 1973, was substituted as proper party defendant in this action as the present Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellants, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia,* that appellees, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation and Finance of the State of New York, be permanently enjoined from (1) approving or paying any funds pursuant to Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State, which provide for health, safety and welfare grants and partial tuition reimbursement payments to low-income parents for educating their children in nonpublic schools; and from (2) according a modification of taxable gross income, pursuant to Sections 3, 4 and 5 of Chapter 414, to middle-income parents as financial relief for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, appellees Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as

parties defendant. Similar permission was granted to appellee, Senator Earl W. Brydges, then Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constituted, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion, concurred in by Judges Cannella and Hays, declaring, *inter alia,* that Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York State pertaining to health, safety and welfare grants and tuition reimbursement payments violate the Establishment Clause of the First Amendment. As part of the Court's opinion, Judge Gurfein, with Judge Cannella concurring, held that Sections 3, 4 and 5, with respect to modification of taxable gross income, did not violate the Establishment Clause.

The Court, in striking down Section 1, which provides health, safety and welfare grants for nonpublic schools in economically impoverished areas, concluded, in part, as follows:

> "In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequences to both."

In striking down Section 2 of Chapter 414, which provides for partial reimbursement to poor parents for the tuition they pay to send their children to nonpublic schools, the Court recognized the secular purposes of this program and observed as follows:

> "The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise

of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

"The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society."

On October 20, 1972, judgment was entered permanently enjoining the

> "payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair"

and

> "payment for or reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

In upholding the constitutionality of the modification from gross taxable income for tuition paid by middle-income parents to nonpublic schools, the majority opinion reasoned, in part, as follows:

> "The third part [Sections 3, 4 and 5] of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State.* Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as to not involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines."

Summary of Argument

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. To maintain this level of scholastic achievement, it is important that nonpublic schools continue in existence. The demise of the nonpublic schools of this State presents so formidable a catastrophy as to threaten the quality of education of all the children of New York State. As a result of this awareness, the New York State Legislature enacted in 1972 compre-

hensive programs designed to assist low-income and middle-income parents to exercise their constitutional right to educate their children in nonpublic schools. These multi-faceted aid programs provide for: (1) the health, safety and welfare of children attending 280 nonpublic schools located in impoverished areas; (2) tuition reimbursement grants for low-income parents; and (3) a modification of taxable gross income for middle-income parents educating their children in the nonpublic schools. The educational grants to nonpublic schools in impoverished areas to insure the health, welfare and safety of children attending those facilities and the tuition reimbursement payments to low-income parents are public welfare benefits. Artificial barriers should not be erected to stifle the will of state legislatures to offer minimal assistance to parents and their children who choose a parochial school over the public school. The program of health, safety and welfare grants is authorized within the guidelines of this Court's decision in the *Lemon* Case which acknowledges that states do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools. The tuition reimbursement grants for low-income parents, limited in amount and in payment to the individual parent rather than the nonpublic school institution, are clearly reimbursement payments for secular and neutral services, recognized as constitutional by this Court in the *Lemon* case. The program affording a modification of taxable gross income for middle-income parents is a response to the well-settled constitutional principle that taxing authorities, such as the State, have very wide latitudes in making exceptions from taxes. Moreover, this form of tax relief for middle-income parents does not violate the Equal Protection Clause inasmuch as this class of beneficiaries bears a fair and substantial relationship to the object of the legislation; namely, a tax incentive to parents who expend their own funds for the education of their children and thereby save the State substantial expenditures for otherwise educating their children in public schools. These three State educational programs are further in accord with the guidelines of this Court in the *Lemon Case* in

that no "excessive entanglement" is involved in their implementation. The administrative procedures employed are purely technical in nature and involve no scrutiny of the religious institutions or their activities. The "Establishment Clause" with all of the judicial gloss placed on it should not be distorted to stifle the will of the democratic organs of our society to offer minimal assistance to enable parents to choose the nonpublic schools over the public schools.

ARGUMENT

Point I

The three-judge federal district court erroneously held that the state's public welfare programs consisting of low-income educational assistance programs of health, safety and welfare grants and tuition reimbursement grants would unconstitutionally "advance" religion and would involve "excessive entanglement" between government and religion.

The low-income educational assistance programs enacted by Chapter 414 of the 1972 Laws of New York State are specifically designed, in Sections 1 and 2, to partially assist low-income parents in the education of their children in nonpublic schools. These programs are a response to the fiscal crisis facing the entire educational system in New York State and also the economic crisis facing poverty area parents, who, without some form of public welfare assistance, would be unable to provide for the education of their children.

A. The Provisions of Section 1—The Health, Safety and Welfare Grants

To insure the health, safety and welfare of nonpublic school children, Section 1 of Chapter 414, provides grants for maintenance and repair programs for nonpublic schools in urban areas which serve high concentrations of students from low-income families. These poverty area schools are designated on

the basis of the number of enrolled children from families receiving social service assistance in the form of aid to dependent children. Designation of eligible schools is by the New York Commissioner of Education and the local school superintendent pursuant to Title IV of the Federal Higher Education Act.

The basic grant is $30 per pupil, which is increased by $10 for children receiving instruction in school buildings over 25 years old. The grants, sent directly to the schools, are to be applied only for such health, safety and welfare purposes as heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the State Commissioner of Education may deem necessary to ensure the health, welfare and safety of enrolled students. The schools must annually account for the proper expenditure of such grants, by a private audit. In no event can the total payment to a nonpublic school for such services exceed one-half of the actual costs[1] of such comparable services in the public schools. Approximately 280 nonpublic schools, with an enrollment of 100,000 students, are eligible. (There are approximately 2,000 nonpublic schools in the State.)

B. The Provisions of Section 2—Tuition Reimbursement Grants for Low-Income Parents

Section 2 of Chapter 414 provides partial assistance to low-income families in meeting their financial burden in supporting the compulsory education of their children who are full time students in New York nonpublic elementary and secondary schools. This Court has long recognized the right of individual parents to select a school, other than public, for the education of their children (See, *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). This right, however, is diminished or even denied to

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[1] These costs are presently available to the State Education Department from annual reports of the public schools.

children of low-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

The partial assistance to low-income families consists of tuition reimbursement payments to parents paying tuition for children in nonpublic schools. Eligible parents are those with net taxable incomes of under $5,000 a year. The payments, made directly to the parents, would amount to $5 per month for each child in grade levels one through eight and $10 for children in grade levels nine through twelve. Payments would be reduced for months in which a child is not enrolled in the nonpublic school. The tuition reimbursement cannot exceed 50% of the actual tuition payments made by the parent. Eligible parents must apply for such assistance to the State Commissioner of Education following completion of the school year for which tuition has been paid.

A similar measure was recommended on April 20, 1972 for enactment on a Federal level by President Nixon's Panel on Nonpublic Education. (See, Final Report of the President's Panel on Nonpublic Education, U. S. Gov. Print. Office, Stock No. 1780—1972), pg. 35. The Panel is a sub-committee of the "blue ribbon" group of educators, lawyers and fiscal experts who constitute the President's Commission on School Finance.

C. Legislative History of Chapter 414—Fiscal Crisis in New York State

New York State legislators, representing all political viewpoints, are concerned not only about the 3.2 million pupils enrolled in our public schools but also about the 750,000 pupils enrolled in the State accredited nonpublic schools, where children are required by law to receive a secular education equivalent to that in the public schools.[2] Since 1787 the public policy of the State has been that all children, regardless of how or

[2] N. Y. Education Law, Section 3204.

where they are educated, are to receive a standard quality education and this is to be insured by the State.[8]

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for ". . . the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of all its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about $2.5 billion in 1972-73, an increase of almost $500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The Table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that

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[8] N. Y. Laws Ch. 82 (1787) established the Regents of the University of the State of New York . . . "to visit and inspect all the colleges, academies and schools which are or may be established in this State, examine into the status and system of education and discipline therein, and make a yearly report thereof."

would be available to support an influx of nonpublic students into the public schools.

Property Tax Revenue Remaining Under Constitutional Limits for the Support of Education in Selected Cities[4]

City	*1971-1972 Property Tax Margin Remaining*	*1970-1971 Nonpublic Enrollment*	*Amount available per pupil at local level if all nonpublic pupils were transferred to public schools*
Auburn	$ 254,122	1,709	$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	—0—	9,946	—0—

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of $750 per pupil) would be well nigh impossible if these students should transfer in any substantial numbers. In fact, the Table demonstrates

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[4] Table and informational data in this paragraph "C" are derived from 1972 Report of New York State Commission on the Quality Cost and Financing of Elementary and Secondary Education. Chapter V—Aid to Nonpublic Schools.

that even a small number of transfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately $1400 per year. The financial crisis that would be precipitated by attempting to maintain this present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over $1 billion additional annual operating cost that would be necessary, (750,000 pupils × $1,400) and the estimated $1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children. The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is $600,000,000 more than the entire revenue currently generated by the New York State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its 1972-73 budget on *anticipated* Federal revenue sharing of $400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer to the Legislature was obvious. Survival of quality education was at stake.

Most severely threatened by New York State's fiscal crisis are the inner city poverty area schools. This is the case because the parents of the children attending the nonpublic schools in these areas are either impoverished or of such low-income standing that they are unable to contribute sufficiently to the maintenance and operation of the nonpublic schools. Of particular significance is the additional fact that in these inner city areas the public schools are already undersized and overcrowded and incapable of accepting any further influx of students (cf., *Nebraska State Bd. of Educ., et al.* v. *School District of Hartington,* et al., 188 Neb. 1 (1971), cert. den. Supreme Court Docket No. 71-1537 (October 16, 1972), which sustained the constitutionality of a state financed program of secular education in economically hard pressed inner city schools).

Thus the New York State Legislature responded, by overwhelming pluralities in both houses, with programs of aid to assist low-income parents in educating their children in nonpublic schools. Chapter 414 of the 1972 Laws of New York, provides broad-based programs to insure the quality of education of all children within the State during this period of extreme fiscal crisis. It encompasses a multi-faceted aid program designed to insure the health, safety and welfare of children attending schools in impoverished areas; and a program of financial grants to parents of low-income status, to enable all parents, not just the wealthy, to continue to educate their children in nonpublic schools and to avoid any precipitous school closings which would necessarily endanger the quality of education in the public schools.

D. Constitutionality of Health, Safety and Welfare Grants

1. Purpose and primary effect tests are satisfied.

Section 1 of Chapter 414 satisfies the constitutional standards succinctly stated in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ."[5]

The background history to Chapter 414 of the 1972 Laws of New York State and the legislative findings contained in the legislation (Appendix to this Brief) demonstrate graphically the grave emergency now existing concerning the education of children from low-income families concentrated in inner-city areas. At the heart of this crisis is the lack of financial ability of low-income parents to provide for the proper maintenance and repair of school buildings to insure the health, safety and welfare of the students. As demonstrated above (pgs. 12 through 14) closing such schools and absorbing the nonpublic school population into the public schools is not a viable alternative because of the already overly crowded conditions in

[5] The Third Constitutional test that ". . . the statute must not foster an excessive government entanglement with religion" 403 U.S. 602, 613, is likewise satisfied. See this Brief pgs. 22 through 24.

the public schools and the lack of public funds either at a local level or a state level to build the necessary structures for educating children in the inner-city areas.

In the *Lemon case* this Court acknowledged that States do have a legitimate interest under their police powers to insure the health, safety and welfare of children in nonpublic schools.

In recognition of this permissible area of legislation, the New York State Legislature provided for grants in aid to nonpublic schools located within impoverished areas. Notably, the children benefiting from such grants attend only schools where teachers, including those in nonpublic schools, are entitled to partial forgiveness of repayment of Federal educational loans. Such loan relief is afforded under Title IV of the Federal Higher Education Act of 1965 to induce teachers to instruct in impoverished areas.

To insure that the primary effect of the grants is not to advance religion, an annual accounting is required to establish that the State payments are applied solely for the health, safety and welfare of children attending such schools. As additional assurance of the secularity of the program, in no event can the total payment to a nonpublic school for such services exceed one-half the actual costs of such comparable services in the public schools.

2. No Violation of New York Blaine Amendment.

The so-called "Blaine Amendment," Article XI, Section 3, of the New York State Constitution is cited by appellants as authority for prohibiting the expenditure of State funds for the health, safety and welfare grants to poverty area schools. *Blaine* prohibits the expenditure of public funds . . . "directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any demominational tenet or doctrine is taught. . . ."

Notwithstanding these explicit prohibitions, *Blaine* has no application to state welfare programs, of which Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York are a part.

Article VII, Section 8 of the New York State Constitution provides:

> "2. Subject to the limitations on indebtedness and taxation, *nothing in this constitution contained* shall prevent the legislature from providing for the aid, care and support of the needy . . . or for health and welfare services for all children. . . ." (emphasis added)

The educational appropriations consisting of health, safety and welfare grants which benefit poverty area students and the tuition reimbursement payments to low-income parents, which partially relieve their financial burdens of educating their children, are public welfare benefits which are not limited by the Blaine Amendment. As noted in The Final Report of the President's Panel on Nonpublic Education, *supra*, pg. 28:

> "Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to nonpublic school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted."

E. Constitutionality of Tuition Reimbursement Grants for Low-Income Families

1. Purpose and Primary Effect Tests are Satisfied.

The three-judge District Court recognized that the low-income tuition reimbursement program embraces secular purposes, namely:

> "The essential reliance of the State in support of this part of the statute is two-fold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their 'right' to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast

upon the State in the event of their unfortunate demise will be almost intolerable.

"These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public."

Nonetheless, in spite of the lower court's acknowledgement of the fiscal crisis facing both low-income parents and the state, the court held the low-income tuition reimbursement plan unconstitutional because in its view, it violated the second criterion of the *Lemon* decision, i.e., the prohibition against "advancement of religion." It is submitted that this conclusion was based on a totally constricted and myopic view of the *Lemon* decision and its underlying First Amendment rationale. In *Lemon* itself, the Supreme Court cautioned that in this unique and sensitive constitutional area substance must prevail over form and courts are not "to engage in a legalistic minuet in which precise rules and forms must govern," 403 U.S. at 614; and, in the companion case, *Tilton* v. *Richardson*, 403 U.S. 672 at 678 the Court even more sternly admonished that:

"Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics . . . Candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."

We submit that in holding the low-income tuition reimbursement plan void, the three-judge District Court did precisely what this Court in *Lemon* and *Tilton* admonished against; the lower court expressly viewed the *Lemon* test as a simplistic if not arbitrary prohibition of direct state grants of money to aid church-affiliated schools. By so viewing the *Lemon*

criteria the lower court, we submit, was in reality converting it from a principle of living and organic law into a rigid mechanical formula or rule of the physical sciences, such as Newton's Law of Gravity or the Pythagorean theorem.

But the "advancement" standard of *Lemon* is not, as the lower court believed, whether a program of fiscal aid to nonpublic education will *in any way* "advance" religion. Quite the contrary, the standard as clearly enunciated in this Court's opinion in *Lemon* (and repeated in *Tilton*) is that the program must have "a primary effect that neither advances nor inhibits religion." (403 U.S. at 612). We submit that the primary effect of the low-income tuition reimbursement plan is clearly and overwhelmingly secular; it is a welfare program to alleviate the present overcrowding and fiscal crisis in inner-city public and nonpublic schools and enable numerous children from low-income families to obtain a basic education in the only schools that are now available to provide it.

Contrary to the position taken by the appellants, there is absolutely no evidence in the record which demonstrates that the nonpublic schools that might receive some indirect benefit under the low-income tuition reimbursement plan are primarily or even secondarily religious in their purpose and mission.[6] Rather, the background of the legislation and the specific legislative findings incorporated in the act demonstrate most conclusively that the purpose and mission of those schools is to educate one out of five of all school children in the entire State, relieve an enormous economic burden from the taxpayers, and provide children with a secular education.

This Court has long recognized the right of individual parents to select a school other than public for the education of their children (See, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). This right, however, is diminished or even denied to children of lower income families, whose parents, of all groups,

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[6] In fact, Appellee has specifically denied in his answer such allegations in appellants' complaint (Appendix, pg. 73a.)

have the least options in determining where their children are to be educated. In keeping with this viewpoint, this Court in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), sustained a state-financed program of bus transportation enabling children to attend church-related schools. In its opinion this Court emphasized the public purpose which was being performed, saying:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (330 U.S. 1, 7)

Twenty years later in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), this Court sustained a state-financed program of loan of secular textbooks which included children attending church-related schools. In the majority opinion, Justice White suggested some of the guidelines for judging constitutional permissibility of other programs, saying:

> "Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." (392 U.S. 236, 243)

The third decision to deal with the issue of education aid was *Lemon* v. *Kurtzman,* et al., 403 U.S. 602 (1971) with its related cases of *Earley* v. *DiCenso,* and *Robinson* v. *DiCenso,* as well as *Tilton* v. *Richardson,* 403 U.S. 672 (1971). Unlike the two prior decisions upholding aid, the *Lemon* decision, held that programs to subsidize teachers' salaries in church-related schools were unconstitutional. However, the basis for unconstitutionality was not violation of the "purpose" or "primary effect" tests, but the "excessive entanglement" test.

Lemon did not deal with other programs, yet unfashioned, which take the form of educational public welfare tuition grants, as herein presented.

Even Justice Douglas, who presented a strong dissent in the *Allen* case, seemed to concede the validity of child and parent benefit legislation when he stated:

> "There is nothing ideological about a school lunch,

or a public nurse, or a *scholarship.*" (392 U.S. 236, at 257. (emphasis added)).

F. States Have Broad Discretion in the Enactment of Public Welfare Legislation

The New York Health, Safety and Welfare Grants and Tuition Reimbursement violate no constitutional principle. The State has designed a program which it feels best preserves and perhaps even enhances the educational opportunities of all children of the State. While the Courts may not agree with the wisdom of this legislation, it has been recognized that the states are free to disburse welfare funds without judicial intervention so long as the action is rationally based and free from "invidious" discrimination. *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970). The New York program has the prophylactic effect of insuring the quality of education of all the children of the state and it is unquestionably rationally based and does not invidiously discriminate. In *Dandridge,* this Court said, ". . . [T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." 397 U.S. at 486. The Court further stated at 486, 487, ". . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61."

Finally, this Court states in *Dandridge,* at page 487, ". . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Cf. *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 584-585; *Helvering* v. *Davis,* 301 U.S. 619, 644. Not only are New York's welfare funds limited, its entire budget is precariously balanced only by federal revenue sharing. The low-income educational assistance programs were the legislative response to the State's fiscal crisis and any cutting of this aid by the judiciary will directly harm all the children of New York State.

G. Neither the Health, Safety and Welfare Grant Program Nor The Tuition Reimbursement Program Involves Excessive Entanglement Between Government and Religion

Entanglement between government and religion reaches an impermissible degree when state aid programs to nonpublic schools involve "pervasive restrictions" that require "a comprehensive, discriminating, and continuing state surveillance . . . [of the nonpublic schools] . . . to ensure that these restrictions are obeyed and the First Amendment otherwise respected." *Lemon* v. *Kurtzman,* 403 U.S. 602 at 619. In *Lemon,* the Court found that Rhode Island and Pennsylvania nonpublic school assistance programs ran afoul of the entanglement standard and were thus unconstitutional. A comparison of the nonpublic school assistance programs in *Lemon* and the New York statutes now before the Court clearly shows that the instant statutes do not impermissibly entangle the State in nonpublic schools.

The Rhode Island statute in *Lemon* authorized state supplements to the salaries of teachers of secular subjects in nonpublic schools; the state paid such teachers an amount not in excess of 15% of their annual salary. To qualify for the supplement a teacher was required to teach at a nonpublic school at which the average per pupil expenditure on secular education was less than the average in the public schools. Eligible schools were required to submit supporting financial data to the state to assure compliance with the per pupil expenditure limitations. The government was required to examine the school's records to determine how much was expended for religious education. Eligible teachers were precluded from teaching courses in religion, were permitted to teach only those courses taught in public schools, and could use only teaching material used in the public schools.

The Pennsylvania statute in *Lemon* authorized the state to "purchase" certain "secular educational services" directly from nonpublic schools. The nonpublic schools were required to maintain elaborate accounting records to separately identify the cost of the "secular educational services" and the records

were to be audited by the state to assure compliance. Reimbursement was restricted to courses taught in the public schools and payment for any course containing "any subject matter expressing religious teaching or the morals or forms of worship of any sect," were forbidden.

This Court found that in separating "the religious from the purely secular aspects of [nonpublic school] education . . . to ensure that no [First Amendment] trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions." These restrictions required "comprehensive, discriminating, and continuing state surveillance . . . that resulted in prophylactic contacts . . . involving excessive and enduring entanglement between state and church." (403 U.S. at 617, 619). The Court held that the state inspection and evaluation of the religious content of the nonpublic schools was particularly offensive to the First Amendment and "fraught with the sort of entanglement that the Constitution forbids." (403 U.S. 617 at 620).

In marked contrast, the New York statute here is singularly free of entangling provisions. There is no provision or necessity for any state surveillance, policing or auditing of nonpublic schools. Specifically, the New York statute does not involve excessive entanglement because:

(a) State inspection or auditing of the books and records of nonpublic schools is neither required nor necessary inasmuch as the audit in health, safety and welfare grant programs is exclusively the responsibility of the school.

(b) State inspection or evaluation of the religious content, curricula, or classroom activity of nonpublic schools is not required.

(c) Nonpublic school teachers are not required to be examined, policed, or to sign agreements concerning their religious teaching or beliefs and such requirements are not necessary.

(d) The limitations imposed on the health, safety

and welfare grants, namely 50% of the average statewide costs in the public schools and a comparable ceiling of 50% of the total tuition paid by the parent are statistical guarantees of neutrality. These limitations assure the intrinsic secular nature of the public aid so that inspection and surveillance by the state is wholly unnecessary. In other words, these *secularly self-defining* and *self-executing* grant limitations are built-in safeguards and assurances against impermissible entanglement between Church and State.

H. Constitutionality of Tuition Reimbursement Grants—Ohio and Pennsylvania Plans Distinguished.

Recent decisions have invalidated two state plans for providing tuition reimbursements to parents whose children attend nonpublic schools (*Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio 1972), aff'd. 93 S. Ct 61 (1972)); *Lemon* v. *Sloan*, 340 F. Supp. 1356 (Ed. Pa. 1972), (probable jurisdiction noted, 35 L. E.D. 2nd 268 (1973)). An analysis of those states' statutes demonstrates that these invalidated plans are distinguishable in many significant aspects from the poverty area/ low-income assistance plans of New York.

1. Ohio Plan distinguished (Wolman v. Essex, supra).

The major points of distinction between the Ohio tuition reimbursement plan and the New York plan are as follows:

a) Method of Payment encourages excessive entanglement

The Ohio plan provides for state aid payments to local school districts which in turn make tuition reimbursement payments to eligible parents. Such procedure engenders excessive religious entanglement with public officials at local community levels. The New York statute provides for direct payment by the State Commissioner of Education to the applying parent.

b) Uncertain amount of payment

The Ohio tuition reimbursement payments were fixed at $90 for the first year and then left to the determination of the

Commissioner of Education in future years. On its face, such procedure invites ongoing political entanglement. The New York tuition reimbursement payments are fixed by statute.

c) **Tuition, Reimbursement Payments Not Limited to Secular Purposes**

Under the Ohio plan, a parent could be reimbursed 100% of the tuition paid for his child. In such instances, a portion of the State payment would represent aid for religious instruction. The New York statute provides for a maximum 50% reimbursement, or in other words a statistical guarantee of neutrality. In New York 30% of the total costs of education in nonpublic schools is paid by tuition, the remainder is derived through voluntary contribution, endowments and the like. The maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools. Therefore, in no instance could it be persuasively argued that New York's tuition reimbursement payment supports any religious teaching whatsoever, since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses.

d) **Tuition reimbursement payments not limited to low-income families**

In not restricting the tuition reimbursement payments to low-income families, the Ohio plan was not an educational welfare benefit plan, and was not responsive to the particular financial plight of the low-income parent. The New York plan is solely geared for and restricted to low-income families.

e) **Tuition reimbursement payments not responsive to costs of tuition**

The nonpublic schools in Ohio instituted a tuition program just prior to enactment of the Ohio plan, thus raising the specter that the plan was a subterfuge to channel monies directly to nonpublic schools. The New York plan, on the other hand, is responsive to a long-established tuition program for

the support of nonpublic schools. Its only purpose is to allow low-income parents to participate in such nonpublic schools.

2. *Pennsylvania Plan Distinguished (Lemon v. Sloan, supra).*

The Pennsylvania tuition reimbursement plan bears many of the same infirmities as the Ohio plan. The Pennsylvania statute fails to restrict the amount of tuition reimbursement to less than 100% of tuition paid and also does not restrict the payments to low-income families.

POINT II

New York State and the Federal Government have a long-established policy of monetary grants which subsidize non-public school education and services furnished by church-related facilities.

As Justice Holmes noted nearly half a century ago: "A page of history is worth a volume of logic." (*New York Trust Co.* v. *Eisner,* 256 U.S. 349 (1921). What Justices Holmes meant, of course, is that a practice deeply embedded in our Nation's history carries a certain presumption of constitutional validity.

New York State and the Federal Government have, over the past half century, created a clear pattern of monetary grants directly to individuals for expenses incurred in securing a non-public education and other services furnished by church-related facilities.

A. New York State's Historical Aid Programs to Nonpublic Institutions:

—Monetary aid for nonpublic school attendance

For over a half century the social welfare programs of our State have provided for payments for school expenses to enable parents of low-income to educate their children at nonpublic schools. This New York State policy authorizing monetary grants to assist children in attending nonpublic schools was enunciated

in Section 3209 of the Education Law (formerly Section 627 (f))[7]:

> "Duties of public welfare officials with respect to indigent children. Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, books, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law." (Derived from Chapter 645 of the Laws of 1928).

—Education aid to religious-oriented institutions

For over a century New York State has made direct grants to private religiously-oriented schools for the education of children attending such institutions. Provision for such grants is contained in the following Articles of the New York Education Law:

> Article 81—*Orphan Schools* (Derived from Chapter 261 of the 1850 Laws of New York). In a Taxpayer's action to restrain the payment of public moneys to such schools, the fact that the asylum was controlled by a Re-

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[7] In commenting on the breadth of this enactment, the Attorney General of the State of New York noted (1935 Op. Atty. Gen., 381):

"By this amendment the Legislature has made it the affirmative duty of '*public welfare officials*' to furnish '*indigent children*' with the necessaries of life, including books, shoes, clothing, etc. 'to enable them to attend upon instruction as hereinbefore required by law.' Compulsory education is the rule in this State. Such education may properly be afforded by parochial as well as by public institutions. *Pierce et al.* v. *Society of Sisters*, 268 U.S. 510 (Oregon School case). No distinction or discrimination is seen in the legislative language of Section 627. The only basis is *need*. There are observed no exceptions which provide otherwise in our statutes.

"You are, therefore, advised that the public welfare officials (and this should include those 'public welfare officials' administering relief under the Wicks Act) should and must provide children who are indigent with the necessaries specified to enable them to attend school, whether it be public or parochial in character. It may also be noted that the parochial schools are in substance *public* in character also. The foregoing applies with equal force to those children attending parochial schools of other denominational character, be they Jewish, Protestant or of other persuasion."

ligious organization and that the teachers wore the garb of the sisterhood, was immaterial. The Court concluded that it was not practical to instruct the children elsewhere. *Sargent* v. *Board of Education,* 177 N.Y. 317 (1904).

Article 83—*Indian Schools* (Derived from Chapter 71 of the 1856 Laws of New York).

Article 85—*Instruction of the Deaf and of the Blind* (Derived from Chapter 413 of the 1877 Laws of New York).[8]

Also authorized are payments of State monies to religious agencies for boarding *wayward children* in order to insure their care and protection (Article VI of the Social Services Law of the State of New York, which was derived from Chapter 264 of the 1898 Laws of New York).

Bus transportation aid:

For over 30 years bus transportation has been provided in New York for children attending parochial schools. (N. Y. Education Law, Section 3620).

Textbook aid:

Textbook aid has been provided in New York for all students in grades 7-12 for over five years. (N. Y. Education Law, Section 701).

Scholar incentive aid:

Scholar incentive aid designed to diminish the burden of student tuition payments at the post-secondary level and equalize the ability to choose between public and private institutions was enacted in 1961 and is available to all students in public,

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[8] Noteworthy is the fact that this article specifically lists such institutions as St. Mary's School for the Deaf in the City of Buffalo, St. Joseph's School for the Deaf in the City of New York, St. Francis de Sales School for the Deaf and for the Hard of Hearing in the County of Kings.

private and sectarian institutions (N. Y. Education Law, Section 601-a).

Regents Scholarships:

Since 1913 Regents scholarships have provided tuition relief at the collegiate level for recipients regardless of the sectarian nature of the institution attended. (N. Y. Education Law, Section 601).

B. The Federal Government's Historical Aid Programs to Nonpublic Institutions

The Federal Government over the past quarter century has also established a firm pattern of financial aid for costs incurred in obtaining an education in church-related schools.

"G.I. Bill":

In 1944 Congress enacted the "G.I. Bill." The educational assistance benefits in this law for veterans and their families provides for specified monthly payments to meet, in part, the expenses of "subsistence, tuition, fees, supplies, books, equipment and other educational costs." (38 U.S.C.A., Section 1651, etc.)

Such Federal payments also extend to veterans who desire to complete high school or who need remedial assistance in order to begin college. (38 U.S.C.A., Section 1691-2).

Federal payments for such educational expenses also extend to the children of dead or disabled veterans (38 U.S.C.A., Section 1731, etc.)

Each of these Federal aid programs for educational assistance apply with equal force to attendance at church-related schools. Indeed, literally thousands of checks have been sent by "Uncle Sam" to students and their parents for attending church-related facilities. No Court has ever condemned Congress for attempting "to establish" a religion by making such payments or being "excessively entangled" in religion.

R.O.T.C. Benefits:

The Federal Government also makes direct educational assistance payments monthly to ROTC students (37 U.S.C.A.,

Section 209 and 10 U.S.C.A., Section 2107). The ROTC cadet at Notre Dame qualifies as does his counterpart at non-sectarian universities. No one has ever labelled this an "establishment of religion" nor "excessive entanglement" in religion.

Title I—Federal Elementary and Secondary Education Act:

The Elementary and Secondary Education Act of 1965 was a historic landmark in the extension of educational services and resources to all children in both public and private schools. The main element of this program is Title I which provides for the distribution of services based on educational need and disadvantagement without regard to the school attended. Since the inception of this act, more than approximately one billion dollars worth of services has flowed to educationally deprived children in New York State.

It would serve no useful purpose to catalogue the other numerous instances of State and Federal grants which in one way or another assist parents or students in obtaining an accredited education. Suffice it to say that if the provisions of Chapter 414 of the Laws of 1972 of the State of New York are constitutionally defective, then so is a great mass of other State legislation and Federal enactments which are an integral part of the basic fabric of our State and Federal systems. It would be folly at this stage to charge that such a horrendous number of errors have been committed by our political institutions over the past century.

Those who would deny any form of public assistance to nonpublic education would, in effect, be negating the heritage of both our State and Federal governments.

We are not talking about "strangers" when we are talking about children in parochial and private schools. We are not talking about outlanders. We are talking about our own—about our own family of children within the State of New York. And in order to provide a vehicle through which this thought and this concept could be made effective, in the very beginning of this State we created the University of the State of New York to insure that every child satisfy minimum education require-

ments regardless of his attendance at a public or a nonpublic school.

Children attending nonpublic schools are *Our* people in legal concept, and we have the responsibility to see that education is provided for them and that they receive their education in healthy and safe surroundings and at public expense, if necessary.

POINT III

The lower court's decision should be sustained upholding the constitutionality of Sections 3, 4 and 5 of Chapter 414 which provide tax relief in the form of a modification in gross taxable income for middle income parents paying tuition for children in nonpublic schools.

"Purpose", "Primary Effect" and "Entanglement" Tests are Satisfied.

There is little to add to Part III of the incisive majority opinion of the Federal District Court below with respect to the constitutionality of a modification in gross taxable income for middle income parents paying tuition for children in nonpublic schools, which is provided for by Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State. The arguments raised by Appellants in their brief are basically a reiteration of those points contained in the dissenting opinion of Judge Paul R. Hays, which were specifically addressed and answered in the majority opinion. Appellee, therefore, relies in the main on Part III of the majority opinion of the Federal District Court for the Southern District of New York in support of his argument that this form of tax relief is constitutional. (J.S. 32a–39a)

POINT IV

The Health, Safety and Welfare Grant Program, the Tuition Reimbursement Grant Program and the Tax Relief Program, do not violate the Equal Protection Clause of the 14th Amendment.

A. Health, Safety and Welfare Grants and Tuition Reimbursement Grants

Those directly benefited by the health, safety and welfare grants authorized by Chapter 414 are the children attending the 280 nonpublic schools located in poverty stricken areas of New York State. Indirectly, financial relief is accorded to the children's parents who would otherwise be called upon to finance the maintenance of the health, safety and welfare facilities in these schools. As noted in the legislative findings, such parents are primarily of low-income status and thus unable to bear such financial burdens.

Likewise, tuition reimbursement grants to low-income families are intended to relieve the financial burden imposed on them for tuition payments for their children in nonpublic schools.

These state subsidies, which directly benefit low-income families, are in the nature of welfare grants. The preferential treatment these grants afford low-income families is a rational effort on the part of the New York State Legislature to tackle the educational problems of the poor.

In *Dandridge* v. *Williams,* 397 U. S. 471, 485-86 (1970), this Court "... decided that despite the fact that 'the administration of public welfare assistance ... involves the most basic economic needs of impoverished human beings,' claims of denial of equal protection in the allocation of welfare benefits did not invoke the 'strict scrutiny' developed by the Court for equal protection claims where 'fundamental rights' were at stake. The Court has since reaffirmed this principle in *Richardson* v. *Belcher,* 404 U. S. 78 (1971), and *Jefferson* v. *Hackney,* 406 U. S. 535 (1972). As said in the latter case, 406 U. S. at 546-47:

'So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional strait-jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.'

"If the standard of review is as limited as held in *Dandridge*, appellants' equal protection claim does not reach the level of substantiality. However, it has been recently suggested, see Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17-24 (1972), that the Court is developing a standard more stringent than that limited in *Dandridge* but lower than 'strict scrutiny'—whether as a replacement for the 'two-tiered equal protection' which many have found unsatisfactory, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 177 (1972) (dissenting opinion of Mr. Justice Rehnquist), or as a narrowing of the gap between the tiers. Even if the standard here applicable is 'that a statutory classification bear some rational relationship to a legitimate state purpose,' *Weber* v. *Aetna Casualty & Surety Co.*, supra, 406 U. S. at 172 (Mr. Justice Powell), or that 'an appropriate governmental interest [is] suitably furthered by the differential treatment,' *Chicago Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972) (Mr. Justice Marshall), the test was met here." *Aguayo, et al* v. *Richardson, et al*, (2nd Cir., U.S. Ct. of Appeals), not reported, decided 1-18-73.

The New York Legislature's determination of whether and how improvements can be made in the welfare system is a "legitimate" and "appropriate" function of government. This determination is "suitably furthered" by controlled experiment, a method long used in medical science which has its application in the social sciences as well. As Mr. Justice Brandeis said in his famous dissent in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932), "To stay experimentation in things social and economic is a grave responsibility."

Just as the Due Process clause should not have been read to condemn the experiment in the "laboratory" of "a single courageous State," the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis. As said by Mr. Justice Holmes, dissenting in *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 41 (1928), "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." See also *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911); *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69-70 (1913).

B. Tax Relief Program

It is well settled that a state has very wide latitude in exercising its taxing power and in making exemptions from such taxes and that unless the classification is so palpably arbitrary and irrational that it serves no legitimate state interest, the courts will not interfere in such matters. Any ground of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain such classification, since all persons similarly situated are treated alike. *Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237 (1890); *Rogers* v. *Hennepin County,* 240 U. S. 184, 191 (1916); *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37, 40 (1928); *Allied Stores* v. *Bowers,* 358 U. S. 522, 526-528 (1959). In the latter case, the court found that exempting non-residents' merchandise in storage was a valid exercise of tax power by the state. The constitutional principles pertaining to a state's taxing authority was well stated by the Court in *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509-510 (1931):

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citation omitted). This Court has re-

peatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. (Citations omitted).

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis,* and when subjected to judicial scrutiny they must be presumed to *rest on that basis if there is any conceivable state of facts which would support it.* (Citations omitted).

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. . . ." (Emphasis added).

The proper question is therefore whether the offering of a tax incentive to parents who expend their own funds on tuition of their children and thereby save the state substantial expenditure is a rational basis for granting such parents a modification in gross taxable income for a small fraction of the savings inuring to the state.

The time may have arrived for a soul-searching examination into whether the "establishment" clause with all of the judicial gloss placed on it need be further expanded to stifle the will of the democratic organs to offer minimal assistance to parents who choose the nonpublic school over the public school. (See Concurring Opinion of Harlan, J., in *Walz* v. *Tax Commission,* 397 U. S. 690, 699 (1970).

It is respectfully submitted that this Court need not be the one to erect a barrier to the ability of parents to effectively exercise their constitutional prerogatives.

POINT V

Sections 3, 4 and 5 of Chapter 414 respecting tax relief for middle income families is severable from Section 2 which provides for tuition reimbursement payments.

The District Court held that Sections 3, 4 and 5 of Chapter 414 are severable from Sections 1 and 2. The lower Court's finding is based upon *Tilton* v. *Richardson, supra,* and *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 234 (1932). Of particular significance is the severability clause (§11) of the Act, which provides:

> "If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered."

It is submitted that the dissenting opinion of Judge Hays is not persuasive in finding that the New York State Legislature did not intend the middle income tax relief program to be severable from the low-income tuition reimbursement program. Judge Hays' position is directly contrary to the express legislative direction in Section 11.

Appellants in their Brief have taken a very constricted view of the severability clause by arguing that it is intended solely to preserve parts 4 and 5 of the Act. Appellants claim the programs provided for in those parts are predicated on the invalidation of the health, welfare and safety grants, the tuition reimbursement grants and the tax relief program.

There is no basis for this conclusion. Part 4 (Sections 6 and 7) of Chapter 414 provides a limited amount of aid for two years to impacted public schools who must absorb additional pupils as a result of nonpublic school closings or curtailment of grade levels. Part 5 (Sections 8-10) provides that State aid

may be apportioned for the purchase of existing buildings. These programs are part of the State's 1972 education program to partially alleviate the fiscal constraints on local school districts. Certainly, they were not intended as a substitute for Sections 1, 2 and 3 thru 5 of the Act. The State appropriations for these three programs in the 1972-73 State Fiscal year were $4 million, $15 to 25 million and $10 to 15 million, respectively. Whereas, the appropriation for Part 4 of Chapter 414 was only $2 to 3 million and no appropriation was provided for Part 5.

POINT VI

Legislative bodies and political institutions should not be curtailed in their constitutional right to a free and open debate of issues touching on religion.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case. In declaring unconstitutional Section 1 of Chapter 414 of the 1972 Laws of New York State, the Court implied that the Establishment Clause of the First Amendment was breached since this legislation . . . "would encourage future divisive debate on religious lines". The Court stated that "The political pressures on the Legislature are bound to be strong along religious lines." As authority for this proposition, the Federal District Court relied on the statements of this Court in *Lemon, supra,* 403 U. S. at 623.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue no matter how politically divisive it may be on segments of our society.

It is submitted that "political divisiveness" should not be relied on as a basis for curtailing legislative debate and enactment of legislation respecting issues of a religious nature. Judicial adherence to such a concept may well lead to the resolution of peculiarly volatile social, political and economic is-

sues outside the framework of our democratic process in a manner that is "extra-legal".

The narrow decision in *Lemon* must not foreclose state legislatures from the consideration of other possible and permissible routes of programming nonpublic school aid. Certainly it is the task of the state legislatures, with the guidance of this Court, to evolve the boundaries of constitutional permissibility.

CONCLUSION

It is in the interest of the State of New York to insure that all children regardless of race, color, religion, national origin, income level or poverty background are educated to their fullest potential. It would not be in New York State's best interest to require that all children attend public schools. Such a requirement would mean that an additional 750,000 children (approximately 18% of the total State public and nonpublic school enrollment) would move into the public school system at an operational cost of $1400 per pupil, plus capital costs.

Many of the public schools and especially the ones in the poverty areas are already overcrowded, and an influx of any substantial number of nonpublic school children would compound current adverse pupil-teacher ratio problems. Such an influx would cost the State of New York and local school districts over $1 billion each year in additional operating costs alone. This would aggravate the existing financial crisis in education to a breaking point.

There are other benefits flowing from the availability of nonpublic school education. These benefits include diversity in education, competition in education stimulating progress, experimentation and innovation in non-governmental schools, pluralism, prevention of State monopoly in education, freedom of education, and freedom of thought. New York State has a fine public school education, and it is essential that it continues to exist and fluorish. However, a monopolied education

is not the way to accomplish this goal. (See, *Minnersville School District* v. *Gobitis,* 310 U. S. 598-599 (1939)).

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed with respect to Sections 1 and 2 of Chapter 414 of the 1972 Laws of New York and affirmed with respect to Section 3, 4 and 5 thereof.

Dated: March 19, 1973

Respectfully submitted,

JOHN F. HAGGERTY and
LOUIS P. CONTIGUGLIA
Attorneys for Appellee, Warren M. Anderson
Office and P.O. Address
Senate Chambers
Albany, New York 12224
(518) 472-8567

APPENDIX

Session Laws of New York

Education—Nonpublic Schools—Aid

CHAPTER 414

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, effective as provided in section 12.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12—HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section
549. Legislative findings.
550. Definitions.
551. Apportionment.
552. Applications, reports, regulations.
553. Installments.

§ 549. Legislative findings

The legislature hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per pupil financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five,[1] which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

[1] 20 U.S.C.A. § 1061 et seq.

§ 550. Definitions

In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d),[1] (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,[2] as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and cus-

[1] 42 U.S.C.A. § 2000(d).
[2] 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

todial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment

1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations

Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this article. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments

The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 2. Such law is hereby amended by inserting therein a new article, to be article twelve-A, to read as follows:

ARTICLE 12-A—ELEMENTARY AND SECONDARY EDUCATION OPPORTUNITY PROGRAM

Section

§ 559. Legislative findings

The legislature hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and re-

affirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition réimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

§ 560. Short title

This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions

The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for

nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000(d),[1] and (iii) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,[2] as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

[1] 42 U.S.C.A. § 2000(d).
[2] 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

§ 562. Tuition reimbursement payments to parents

1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school

year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified statement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential and, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the commissioner or any officer or employee of the department to divulge or make known in any manner the amount of income or any other particulars set forth in any verified statement filed with him hereunder or report made to him pursuant to this subdivision; but nothing contained herein shall be considered to prohibit the commissioner's publication of statistics so classified as to prevent the identification of particular affidavits or reports.

§ 563. Commissioner; powers

The commissioner shall have responsibility for the administration of the program created by this article and may promulgate such regulations as are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this article shall be

payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hundred twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subsection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to

such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	—0—

(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) Definitions. (A) "Tuition", as used this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000(d)[1] and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four,[2] as amended. The commissioner of education shall furnish to the state

[1] 42 U.S.C.A. § 2000(d).
[2] 26 U.S.C.A. (I.R.C.1954) § 501(a), (c) (3).

tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year", as used in this subsection, shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having been amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively as follow:

1. No schoolhouse shall hereafter be erected, purchased, repaired, enlarged or remodeled in any school district except in a city school district in a city having seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

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In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousands dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exists upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection or purchase of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of education shall not approve the plans for the erection or purchase of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment, accessibility; soil conditions; initial and ultimate cost.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situtated[1] as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

[1] So in original. Probably should read "situated".

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two hundred thirty-four of the laws of nineteen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, purchase of existing structures, for site purchase and im-

provement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, or purchase of existing structures.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction and the purchase of existing structures the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven though nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction and the purchase of existing structures may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two and the provisions of paragraph (14) of subsection (c) of section six-hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.

IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-694, 72-753, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellants,

v.

EWALD B. NYQUIST *etc. et al.*,
Appellees;

WARREN M. ANDERSON, as Majority Leader and President pro tem of the New York State Senate,
Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

EWALD B. NYQUIST *etc. et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

PRISCILLA L. CHERRY *et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF for APPELLEES BOYLAN, DUCEY, FERRARELLA and ROOS and for APPELLANTS CHERRY, FERGUSON and RUIZ

PORTER R. CHANDLER
Attorney for Appellees Boylan, Ducey, Ferrarella and Roos and for Appellants Cherry, Ferguson and Ruiz
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

... F. NOLAN

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Committee for Public Education & Religious Liberty *et al.*,

Appellees;

Priscilla L. Cherry *et al.*,

Appellants,

v.

Committee for Public Education & Religious Liberty *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF for APPELLEES BOYLAN, DUCEY, FERRARELLA and ROOS and for APPELLANTS CHERRY, FERGUSON and RUIZ

It was agreed by all parties, with the approval of the Clerk of this Court, that each party or distinct group of parties would file one brief on the merits of all four of these consolidated appeals. This brief is submitted on behalf of appellees Boylan, Ducey, Ferrarella and Roos in appeal 72-694 and appellants Cherry, Ferguson and Ruiz in appeal 72-929, all of whom are parents of nonpublic school children who intervened as parties defendant in the District Court.

Opinions Below

The opinions of the District Court, upon which the judgment appealed from was entered, are reported at 350 F. Supp. 655 *et seq.* Copies of the opinions are also set forth in the Appendix to the Jurisdictional Statement of appellant Cherry *et al.* [hereinafter "JSA"] at pages 1a and 40a. In addition, an earlier per curiam opinion is set forth at page 46a.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3), 2281 and 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment to the United States Constitution. The judgment of the District Court was entered on October 20, 1972. Appellants Cherry, Ferguson and Ruiz filed their Notice of Appeal on October 27, 1972 and their Jurisdictional Statement on December 26, 1972. On January 22, 1973, this Court noted probable jurisdiction.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. §§ 1253, 2101(b). Recent cases sustaining the jurisdiction of this Court to review this case on direct appeal

are *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso,* 403 U.S. 602 (1971), and *Tilton* v. *Richardson,* 403 U.S. 672 (1971).

Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 414 of the 1972 Laws of New York, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." N.Y. Educ. Law §§ 408(1), 408(2), 408(3), 408(6), 549-53, 559-63, 3602(6), 3602(15), (McKinney Cum. Supp. 1972); N.Y. Tax Law §§ 612(c)(14), 612(j) (McKinney Cum. Supp. 1972). The full text of the statute [hereinafter referred to as "Chapter 414"] is set forth both in the Appendix to this brief[1] and at JSA, p. 55a *et seq.*

Chapter 414 is an omnibus statute, and each of its substantive sections under review herein must be considered independently of the others.

Section 1 requires the Commissioner of Education of the State of New York to make health, welfare and safety

[1] Hereinafter "BA".